Muhibbah Engineering (M) Bhd v Pemungut Duti Setem

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(NCVC)(A)-463–12 OF 2016
TENGKU MAIMUN, ABDUL RAHMAN SEBLI AND ZALEHA YUSOF JJCA
5 SEPTEMBER 2017

Revenue Law — Stamp duty — Exemptions — Appellant paid ad valorem stamp duty on facility agreement — Appellant appealed against stamp duty and sought application of the Stamp Duty (Remission) (No 2) Order 2012 — Whether negative pledge in banking facility agreement was 'security' within meaning of para 2 of the Stamp Duty (Remission) (No 2) Order 2012

Maybank Islamic Bhd ('Maybank') provided banking facility to the appellant and subsequent thereto, Maybank and the appellant entered into a facility agreement. The appellant had paid ad valorem stamp duty on the facility agreement amounting to RM1.98m. Vide a letter dated 17 August 2015 to the respondent, the appellant appealed against the stamp duty and sought application of the Stamp Duty (Remission) (No 2) Order 2012 ('the Remission Order') to the facility agreement. By notice of assessment, the respondent rejected the appellant's appeal. The appellant's appeal against the notice of assessment was also rejected. The appellant then appealed to the High Court against the assessment. The learned judge dismissed the appellant's appeal and held that the facility agreement was with security and therefore subject to payment of stamp duty. Hence, the present appeal. The issue for court's decision was whether a negative pledge in a banking facility agreement was a 'security' within the meaning of para 2 of the Remission Order.

Held, allowing the appeal with costs of RM10,000 subject to payment of allocator fee:

(1) Based on the definition of the word 'security' in the Lexis Nexis publication of *Words, Phrases and Maxims — Legally and Judicially Defined* (Vol 13), the negative pledge by the appellant was certainly not a security as it was not an encumbrance vested in Maybank over the properties of the appellant, not did it vest in Maybank a right over the properties which enabled Maybank to realise the loan amount from the properties in the event of default by the appellant. Being a mere pledge not to encumber properties and nothing more, there was no property for the respondent to realise in the event of default (see para 61).

(2) The matter of concern for the Remission Order was not the loan agreement or loan instrument itself but whether there was in existence

A another instrument that created an obligation to pay a sum or sums of money on demand or in a single bullet payment. It was only where such instrument existed that entitlement to a remission of stamp duty was excluded by the Remission Order. In the present case, there was no other instrument independent of the facility agreement which secured an B obligation to secure a sum or sums of money on demand. As the negative pledge only created an obligation not to encumber or charge assets as stipulated in the pledge, the facility agreement clearly fell under sub sub-item 22(1)(b) of the First Schedule to the Stamp Act 1949. The learned judge was therefore erroneous in holding that the negative pledge C given by the appellant constituted security for the facility agreement (see paras 25, 71–72 & 76).

[Bahasa Malaysia summary

Maybank Islamic Bhd ('Maybank') memberikan kemudahan perbankan D kepada perayu dan kemudiannya, Maybank dan perayu memasuki perjanjian kemudahan. Perayu telah membayar duti setem ad valorem atas perjanjian kemudahan berjumlah sebanyak RM1.98 juta. Melalui surat bertarikh 17 Ogos 2015 kepada responden, perayu merayu terhadap duti setem dan memohon permohonan Perintah Duti Setem (Peremitan) (No 2) 2012 E ('Perintah Peremitan') kepada perjanjian kemudahan tersebut. Melalui notis taksiran, responden menolak rayuan perayu. Rayuan perayu terhadap notis taksiran juga ditolak. Perayu kemudiannya merayu kepada Mahkamah Tinggi terhadap taksiran. Hakim yang bijaksana menolak rayuan perayu dan memutuskan bahawa perjanjian kemudahan adalah dengan jaminan dan oleh F itu adalah tertakluk kepada bayaran duti setem. Maka, rayuan ini. Isu untuk keputusan mahkamah adalah sama ada ikrar negatif di dalam kemudahan perbankan adalah 'security' dalam maksud perenggan 2 Perintah Peremitan tersebut.

G **Diputuskan,** membenarkan rayuan dengan kos sebanyak RM10,000 tertakluk kepada bayaran fi alokator:

(1) Berdasarkan definisi perkataan 'security' di dalam penerbitan *Words, Phrases and Maxims — Legally and Judicially Defined* (Vol 13), cagaran H negatif oleh perayu sudah pasti bukan jaminan kerana ia bukan rintangan yang diletakhak di dalam Maybank ke atas hartanah perayu, juga tidak ia diletakhak di dalam Maybank ke atas hartanah yang membolehkan Maybank merealisasi jumlah pinjaman daripada hartanah sekira berlakunya pengingkaran oleh perayu. Hanya sebagai ikrar untuk I menghalang hartanah dan tidak lebih daripada itu, tidak terdapat hartanah untuk responden merealisasi sekira berlakunya pengingkaran (lihat perenggan 61).

(2) Perkara penting Perintah Peremitan adalah bukan perjanjian pinjaman itu sendiri tetapi sama ada wujud instrumen lain yang membentuk

tanggungjawab untuk membayar jumlah wang atas tuntutan atau bayaran secara sekaligus. Ia hanya di mana instrumen sedemikian wujud hak kepada peremitan duti setem tersebut dikecualikan oleh Perintah Peremitan. Dalam kes ini, tidak terdapat instrumen lain yang bebas daripada perjanjian kemudahan yang mana menjamin tanggungjawab untuk menjamin jumlah wang yang dituntut. Memandangkan ikrar hanya membentuk tanggungjawab untuk tidak menghalang atau caj aset-aset yang ditetapkan di dalam ikrar, perjanjian kemudahan jelas terangkum di bawah sub sub-item 22(1)(b) Jadual Pertama kepada Akta Setem 1949. Hakim yang bijaksana oleh itu adalah tersilap dalam memutuskan bahawa ikrar negatif yang diberikan oleh perayu membentuk jaminan bagi perjanjian kemudahan tersebut (lihat perenggan 25, 71–72 & 76).]

Notes

For cases on exemptions, see 10(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 3154–3156.

Cases referred to

Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue [2009] HCA 41; (2009) 239 CLR 27, HC (refd)

Ben-Odeco Ltd v Powlson (Inspector of Taxes) [1978] STC 460, HL (refd)

Cormack's Trustees v Inland Revenue (1924) SC 819, Sc (refd)

Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors [1985] 2 MLJ 35, SC (refd)

Galaxy Energy Technologies Sdn Bhd v Deputy Collector of Stamp Duty, Malaysia & Anor [2011] 5 MLJ 145; [2011] 5 CLJ 829, CA (refd)

Holmleigh (Holdings) Ltd v IRC; Metropolitan Boot Co Ltd v IRC (1958) 46 TC 435, Ch D (refd)

Independent Television Authority and Another v Inland Revenue Commissioners [1960] 2 All ER 481; [1961] AC 427, HL (refd)

Inland Revenue Commissioners v Henry Ansbacher & Co [1962] 3 All ER 843; [1963] AC 191, HL (refd)

Jones v Commissioners of Inland Revenue; Sweetmeat Automatic Delivery Company v Commissioners of Inland Revenue [1895] 1 QB 484, QBD (refd)

Koperasi Serbaguna Kebangsaan Berhad v Pemungut Duti Setem, Wilayah Persekutuan, Kuala Lumpur [2004] 7 MLJ 482; [2003] 8 CLJ 223, HC (refd)

Lim Teck Lee v The Commissioner of Stamps [1956] 1 MLJ 135, CA (refd)

Limmer Asphalte Paving Company, Limited, v Commissioners of Inland Revenue (1872) LR 7 Exch 211 (refd)

Maughan (Surveyor of Taxes) v Free Church of Scotland (1893) 3 TC 207 (refd)

National Mutual Life Nominees Limited v Commissioner of State Taxation (WA) (1991) 4 WAR 226, SC (refd)

A *National Telephone Company, Limited v Commissioners of Inland Revenue* [1899] 1 QB 250, CA (refd)
The National Telephone Company, Limited v The Commissioners of Inland Revenue [1900] AC 1, HL (refd)
B *Underground Electric Railways Company of London, Limited And Glyn, Mills, Currie & Co v The Commissioners of Inland Revenue* [1916] 1 KB 306, CA (refd)
Warrington and another v Furbor and another [1803–13] All ER Rep 292; (1807) 8 East 242, KBD (refd)

C **Legislation referred to**

Stamp Act 1891 [UK] First Schedule
Stamp Act 1921 [AUS] Second Schedule, item 13
Stamp Act 1949 s 4(1), First Schedule, item 22(1)(b)
D Stamp Duty (Remission) (No 2) Order 2012 para 2
Television Act 1954 [UK] s 2

Appeal from: Originating Summons No WA-24NCVC-348–03 of 2016 (High Court, Kuala Lumpur)

E *Mohd Arief Emran Arifin (Jason Liang Dinghui and Kellie Allison Yap with him) (Wong & Partners) for the appellant.*
Shafini Abdul Samad (Irfan Muashik bin Jantan with her) (Legal Officer, Inland Revenue Board) for the respondent.

F **Abdul Rahman Sebli JCA (delivering judgment of the court):**

[1] The question for our determination was whether a negative pledge in a banking facility agreement is a 'security' within the meaning of para 2 of the G Stamp Duty (Remission) (No 2) Order 2012 ('the Remission Order') which is couched in the following language:

> 2 The amount of stamp duty that is chargeable under sub sub-item 22(1)(b) of the First Schedule to the Act *upon a loan agreement or loan instrument without security* for any sum or sums of money repayable on demand or in single bullet repayment H under that sub sub-item which is in excess of zero point one per cent (0.1%) *is remitted*. (Emphasis added.)

[2] Sub sub-item 22(1)(b) of the First Schedule to the Stamp Act 1949 ('the I Stamp Act') referred to in the above Remission Order stipulates as follows:

> 22 BOND, COVENANT, LOAN, SERVICES, EQUIPMENT LEASE AGREEMENT OR INSTRUMENT of any kind whatsoever:
>
> (1)(b) for any sum or sums of money, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack.

[3] Read together with this sub sub-item, what para 2 of the Remission Order means is that stamp duty that is chargeable on a loan agreement or loan instrument without security for any sum or sums of money repayable on demand or in single bullet repayment is remitted, meaning to say such loan agreement is exempted from payment of stamp duty. A B

[4] The facts, as set out in the case stated, are as follows. Maybank Islamic Bhd ('Maybank') provided banking facility to the appellant vide letter of offer dated 20 November 2013. Subsequent thereto, a facility agreement dated 2 June 2015 ('the facility agreement') was executed between the appellant and Maybank for the transfer/refinancing of the appellant's combined tradeline facilities from RM330m to Islamic combined tradeline facilities amounting to RM595m. C

[5] The appellant paid ad valorem stamp duty on the facility agreement amounting to RM1.98m and Maybank issued the receipt for stamping dated 3 June 2015. D

[6] On 20 August 2015, the respondent received the appellant's letter dated 17 August 2015, appealing against the stamp duty and seeking application of the Remission Order to the facility agreement. By notice of assessment dated 15 September 2015, the respondent rejected the appellant's appeal. E

[7] The appellant appealed against the notice of assessment by letter dated 9 October 2015, requesting the respondent to reconsider the assessment of stamp duty and to allow for remission under the Remission Order. The appellant further appealed against the notice of assessment by letter dated 28 December 2015, in which the appellant submitted the supplemental amendment and restatement agreement ('SARA') dated 28 December 2015 to qualify for remission under the Remission Order. F G

[8] On 12 February 2016, the respondent notified the appellant that the appeal was rejected and maintained its assessment of stamp duty amounting to RM1.98m. H

[9] Aggrieved by the decision, the appellant appealed to the High Court against the assessment. The learned judge dismissed the appellant's appeal, holding that the facility agreement was with security and therefore subject to payment of stamp duty. Hence the present appeal. I

[10] Having heard arguments by both parties, both oral and written, we unanimously allowed the appellant's appeal and set aside the decision of the High Court. These are our grounds for allowing the appeal.

[11] In the High Court, the reliefs sought by the appellant were as follows:

(a) an order that the facility agreement between the appellant and Maybank dated 2 June 2015 together with the SARA dated 28 December 2015 qualified for a remission pursuant to the Remission Order; and

(b) an order that should the facility agreement qualify for remission under the Remission Order, the excess stamp duty paid on the facility agreement amounting to RM495,000 be refunded to the appellant.

[12] The issues for the High Court's determination were the following:

(a) whether the term 'negative pledge' in the facility agreement carries the meaning of 'security' ('jaminan' or 'cagaran'); and

(b) whether the facility agreement, including the SARA are entitled to a remission of the stamp duty under the Remission Order.

[13] In holding that the facility agreement was with security and therefore not entitled to remittance of stamp duty under the Remission Order, the learned judge relied on the following grounds:

(a) the facility agreement considered the negative pledge as a security document under cll 1.1, 15 and 16;

(b) the appellant had given a security in the form of a guarantee of the fulfilment of an undertaking or the payment of the loan. The appellant's financier Maybank was assured by the appellant's pledge that when it demanded the sums loaned under the facility agreement, the appellant was liable to pay back the loan or the facility since the appellant was unencumbered by other claims. In that way Maybank was guaranteed that a recall of the loan on demand could be secured;

(c) the security documents ie the facility agreement and the negative pledge constituted a security for the payment obligations and liabilities of the appellant; and

(d) the amendments made to the facility agreement through the SARA had removed all references to the security documents and was made retrospectively. Nonetheless, at the point in time when the appellant first stamped the facility agreement, stamp duty was already chargeable and therefore had to be paid by the appellant and therefore with security.

[14] The 'Negative Pledge' is given the following meaning by cl 1.1 of the facility agreement:

Negative Pledge	means the negative pledge granted by the Customer in favour of the Bank undertaking inter alia that it will not create or permit to arise or subsist any encumbrance, mortgage, charge, pledge, lien, right of retention, right of set off or any other security interest on the whole or any part of our present or future assets other than:- (a) liens arising in the ordinary course of business or by operation of law; and (b) security interests existing at the date hereof provided the same has been disclosed to you prior to the date hereof and subject to the amount outstanding and secured thereby at all times and at any time hereafter not exceeding the amount so disclosed at the date hereof;

[15] The word 'security' is not defined by the Remission Order but the same cl 1.1 of the facility agreement defines 'security documents' as to mean:

Security Documents	collectively this Agreement, the Negative Pledge, the Trade Finance Contract Note and all other security documents for the time being or from time to time constituting security for the payment obligations and liabilities (including but not limited to the payment of Indebtedness) of the Customer under and in connection with the Facility and references to the 'Security Documents' shall include references to any one or more of them;'

[16] Under the facility agreement therefore, 'security documents' includes the negative pledge given by the appellant, which was in the following terms:

> NOW IN CONSIDERATION OF THE FOREGOING, *WE HEREBY COVENANT AND UNDERTAKE* that so long as any part of the facility, profit, dividend, income, yield and any other fees, commission, cost or other charges relating thereto and any monies secured herein shall remain outstanding, *we shall NOT without your written consent*:-
>
> (a) *create or permit to arise or subsist any encumbrance, mortgage, charge, pledge, lien, right of retention, right of set off or any other security interest on the whole or any part of our present or future assets other than*:-
>
> (i) liens arising in the ordinary course of business or by operation of law; and
>
> (ii) security interests existing at the date hereof provided the same has been disclosed to you prior to the date hereof and subject to the amount outstanding and secured thereby at all times and at any time hereafter not exceeding the amount so disclosed at the date hereof ... (Emphasis added.)

[17] In considering whether the facility agreement was with or without security, the learned judge took the following approach:

> The crux of the matter before this court is whether the 'loan agreement' or 'loan

A instrument', ie the facility agreements in this case, are 'without security' for the sums of money which are 'repayable on demand'. *In determining this, the court would consider, inter alia, whether the term 'negative pledge' can be construed as being akin to 'security'*. If it is found that the facility agreements are without security, then the plaintiff is entitled to the remittance of stamp duty as provided in para 2 of the B Remission Order 2012. (Emphasis added.)

[18] The baseline of the reasoning is that having been armed with the negative pledge given by the appellant, which is 'akin to a security', Maybank would then be in a position to recover the loan sum on demand, and this takes C the facility agreement outside the scope of the Remission Order, thus disentitling the appellant to a remission of the stamp duty.

[19] The peg on which the reasoning is hung is that since the appellant had pledged not to create or permit to arise or subsist any encumbrance, mortgage, D charge, pledge, lien, right of retention, right of set off or any other security interest on its present or future assets, Maybank had thereby been provided with a 'security' for the loan, the security being the pledge not to do any of those acts. We reproduce below Her Ladyship's reasoning on this point:

E By the 'obligation created by an instrument', namely the facility agreement (following the meaning of the word 'security' as explained by Wright J in *Jones*), the bank is assured by the plaintiff's negative pledge that when the bank demands the sum loaned under the facility agreement, the plaintiff is able to pay back the loan or facility since the plaintiff is not encumbered by other claims on the plaintiff. *In that way, the bank is guaranteed that recall of the loan on demand can be secured*. (Emphasis F added.)

[20] With the above reasoning as its base, it was inevitable that the learned judge would come to the following conclusion at para 46 of her grounds of G judgment:

46. Based on the foregoing considerations, it is clear that the facility agreement, together with the amendments and further provisions in SARA, are agreements which are *with security*. The plaintiff is therefore not entitled to the remittance of stamp duty as provided in para 2 of the Remittance Order 2012. (Emphasis added.)

H

[21] The question of law that arises is whether a negative pledge such as the one provided by the appellant to Maybank is a 'security' within the meaning of the Remission Order. If it is, then a loan agreement with such pledge as security is chargeable with stamp duty and therefore not entitled to the benefit of a I remission under the Remission Order.

[22] In concluding that the facility agreement was with security, it is obvious that the learned judge considered 'security' under the Remission Order as to include the facility agreement itself, which by definition (see cl 1.1) includes

the agreement, being one of the 'Security Documents'. A

[23] With due respect to the learned judge, we must say at the outset that the 'security' that the court should be concerned with is not the loan instrument, ie the facility agreement itself, but the nature of the negative pledge. The words 'without security' in the Remission Order come after the words 'loan agreement or loan instrument'. This can only be construed as to mean a security that is separate from and not part of the loan instrument itself. It refers to a separate security instrument. B

[24] The legislative intent clearly is for the security to be collateral or secondary to that of the loan agreement or loan instrument. To construe otherwise would be to render the Remission Order redundant and will not be applicable in any circumstance as the loan agreement or loan instrument would then, by itself, constitute 'security' in any event and in every case. In our view, that construction will defeat the object of the Remission Order rather than to put its object into effect. C D

[25] We agree with learned counsel for the appellant that the loan agreement is not the operative instrument for the purposes of the Remission Order because the loan agreement is already subject to stamp duty and is the main instrument falling under sub sub-item 22(1)(b) of the First Schedule to the Stamp Act. What the Remission Order is concerned with is whether or not the loan agreement or loan instrument is supported by another instrument that creates an obligation 'for any sum or sums of money repayable on demand or in single bullet repayment'. E F

[26] The parties had cited English and Australian cases to support their respective arguments. Although relevant, these cases are not directly on point, simply because the equivalent provisions in those jurisdictions are not in pari materia with para 2 of the Remission Order. Nevertheless we shall refer to them for the general principles involved. G

[27] In *Independent Television Authority and Another v Inland Revenue Commissioners* [1960] 2 All ER 481; [1961] AC 427, the facts as summarised in the headnote of the law report are as follows. Independent Television Authority ('ITA') and Associated Rediffusion Ltd ('ARL') agreed to provide programmes for broadcasting by ITA pursuant to s 2 of the Television Act 1954. H I

[28] The agreement was to come into operation between 15 August 1955, and 15 November 1955, and to continue in force until 29 July 1964. ARL was to pay ITA a fee at the rate of £495,600 a year for 2 1/2 years and at a rate of £536,900 thereafter. The agreement further provided for an increase or

decrease of such payments in the event of an increase or decrease of 5% or more in the half-yearly index figure (therein defined), compared with the basic index figure (defined as meaning the average of the index figures for all items in the Interim Index Retail Prices published by the Board of Trade).

[29] The Inland Revenue Commissioners held that the agreement was liable to ad valorem stamp duty under the head of charge 'Bond, Covenant, or Instrument of any kind whatsoever (1) being the only or principal or primary security for ... any sum or sums of money at stated periods' within the meaning of the First Schedule to the Stamp Act 1891, and so assessed the duty on the sums payable annually of £495,600 and £536,900 respectively.

[30] From the facts of the case, it is clear that the agreement was the only principal or primary security for payment of the money at stated periods, which was crucial for the Inland Revenue Commissioners to determine whether the agreement was liable to ad valorem stamp duty. The House of Lords affirmed the finding of the Commissioners. The case concerns the following provision of the 1891 English Stamp Act:

> (1) Being the only or principal or primary security for any annuity (except upon the original creation thereof by way of sale or security, and except a superannuation annuity), or *for any sum or sums of money at stated periods*, not being interest for any principal sum secured by a duly stamped instrument, nor rent reserved by a lease or tack. (Emphasis added.)

[31] We reproduce below what Lord Cohen said in his judgment at p 447:

> The commissioners held that the agreement was chargeable under the head 'Bond, Covenant, or Instrument of any kind whatsoever', and assessed the duty accordingly. On appeal, the Divisional Court gave judgment in favour of the Crown and the Court of Appeal affirmed that decision. Mr Asquith argued that if the decision stood, any executory agreement providing for periodical payments such as an agreement for hire of a carriage and the services of a coachman from a livery-stable keeper in consideration of periodical payments, would be chargeable with ad valorem duty as a security, but AL Smith LJ was not frightened by that analogy. After referring to the argument he continued: 'The question, however, is, not what in ordinary parlance could be called a security, but what is the meaning of the word 'security' in this taxing Act; and it seems to me that, when the Act is fully considered, the meaning of the word as used therein is fairly defined by the Act itself'. Then, after setting out the relevant provisions of the head of charge, he continued: 'I will take the word 'bond' and 'covenant' first of all. A bond given for the payment of a sum of money at stated periods, or a covenant given for such payment, is clearly a security within the meaning of the Act. Then I come to the subsequent words, upon which the question in the present case depends, 'or instrument of any kind whatsoever being the only or principal or primary security ... for any sum or sums of money at stated periods'. Those words, in my opinion,

cover a contract in writing, such as this, for the payment of a sum of money at stated periods. I cannot sever the word 'instrument' from the words 'bond' and 'covenant' which accompany it; and, as a bond or a covenant for the payment of a sum of money at stated periods is within the Act, I cannot see how I can hold that a contract in writing to the same effect is not within it. It was argued that a 'security' only means something auxiliary to an antecedent obligation, and therefore that a simple contract for the payment of £12 a year for the use of a telephone is not a security within the meaning of the Act. I think that the word 'security', as used in the Act, clearly includes an instrument by which the obligation to pay is originally created.

[32] In *Underground Electric Railways Company of London, Limited And Glyn, Mills, Currie & Co v The Commissioners of Inland Revenue* [1916] 1 KB 306 Swinfen Eady LJ said at p 313:

It was then contended that the deed was not a security for 'any sum or sums of money at stated periods' as at its date there was no ascertained sum that might become payable, and it was urged that there was no decision upon the language of the schedule now under consideration, that the words extended to money only contingently payable, although there were decisions to that effect under other provisions of the Stamp Act. It has been determined that a deed is liable to be stamped as a security although the instrument itself creates the liability and contains merely a personal covenant or obligation and does not secure or reinforce any antecedent or collateral obligation: It is a security within the meaning of that provision: *National Telephone Co v Inland Revenue Commissioners*.

[33] At p 315 the learned judge went on to say:

In my opinion the deed comes within the language of the schedule to the Stamp Act. It is immaterial whether it is the only, or principal, or primary security; it was the security in respect of the guaranteed dividend — it was the only security for 'any sum or sums of money at stated periods'. Then the duty is upon the sum periodically payable.

Therefore with regard to the first point I am of opinion that the deed was both in fact and in law a deed being 'a bond, covenant, or instrument', coming within the language of this schedule, whereby certain sums were contingently made periodically payable. In these circumstances I am of opinion that the first point taken by the appellants fails and that the deed is liable to ad valorem duty.

[34] Banks J in his supporting judgment said:

I agree, and I do not desire to add anything to what the Lord Justice has said upon the first point which was relied upon by the appellants. On the second point I desire to say just a few words. At one time I felt some difficulty on this point, but the difficulty entirely disappeared upon a closer investigation of the exact language of the statute and the language of the deed. The schedule in the statute includes amongst the documents that have to be stamped a 'bond, covenant, or instrument of any kind whatsoever', and then it goes on to define the class or nature of the bond, covenant or instrument coming within this particular provision. It defines it as

being a document, a 'bond, covenant, or instrument being the only or principal or primary security for any annuity or for any sum or sums of money at stated periods'.

Now that must mean 'for any sum or sums of money payable at stated periods', and the first question for consideration is whether the instrument in question is the only or principal or primary security for an annuity or for any sum or sums of money payable at stated periods.

[35] In *Inland Revenue Commissioners v Henry Ansbacher & Co* [1962] 3 All ER 843 this is what Lord Morris said:

The words 'being the only or principal or primary security (other than an equitable mortgage) for the payment or repayment of money' are, in my view words which must be shown to apply to an instrument which in the first place is within the heading, then the word 'being' requires that to attract the particular specified stamp duty it must also be a security for the payment or repayment of money and must also be 'the only principal or primary' such security. The guarantee is a security for the payment of money. It is not, however, the only such security unless for some reason the sale agreement is not to be regarded as a security for the payment of money. But in my view it clearly is.

My Lords, I am satisfied that the word 'security', as used under the 'Mortgage, bond etc', heading, carries the same meaning as that word bears when used under the earlier heading. It seems to me to follow that, though the guarantee satisfied the test of coming within the 'Mortgage, bond etc' heading, it did not satisfy the test of being the only or principal or primary security for the payment of money. The sale agreement was the principal or primary such security and, therefore the guarantee was not the only or principal or primary such security. It follows that the guarantee was not chargeable under sub-head (1), and accordingly was not liable to the amount of duty assessed by the commissioners.

[36] The meaning of 'instrument of security' in the Second Schedule to the West Australian Stamp Act 1921 ('the WASA') was discussed in the article titled *Stamp Duty: The meaning of 'Instrument of Security' in Theory and Practice by* IG Peek. After reviewing the decision of the Supreme Court of Western Australia in *National Mutual Life Nominees Limited v Commissioner of State Taxation (WA)* (1991) 4 WAR 226, the learned writer wrote:

The second proposition is that, in order to be an instrument of security, *the obligation secured must be one for the payment or repayment of money. An instrument will not satisfy this test if the obligation secured is not of a monetary nature*. A common example of an instrument of security falling outside item 13 is a guarantee given by a holding company, guaranteeing the performance of a building contract by a subsidiary which is a construction company. The same point arises with 'gold loans', under which a quantity of gold is delivered by a 'lender' to a 'borrower' under a gold loan agreement, one of the conditions being that the 'borrower' will deliver to the lender, at some time in the future, an equivalent quantity of gold of the same quality. A security given by the 'borrower' securing its obligation to deliver gold will not be

an instrument of security. In both these cases, the obligation secured is not of a monetary nature. (Emphasis added.)

[37] Item 13 of the Second Schedule to the WASA, which was applicable at the material time, stipulated as follows:

13 MORTGAGE (LEGAL OR EQUITABLE), BOND, DEBENTURE, COVENANT, BILL OF SALE, GUARANTEE, LIEN OR INSTRUMENT OF SECURITY OF ANY OTHER KIND WHATSOEVER:

(1) An instrument referred to in the heading to this item, which instrument sets out the only or principal or primary security for any sum or sums of money at stated periods, being neither interest for any principal sum secured by a duly stamped instrument nor wages or salary or rent reserved by a lease (a) for a definite and certain period so that the total amount ultimately payable can be ascertained for every $100 and.

[38] It is important to appreciate that stamp duty strikes at instruments rather than transactions. This is implicit in s 4(1) of the Stamp Act:

4(1) Subject to this Act and subject to the exemptions contained in this Act and in any written law for the time being in force, the several *instruments* specified in the First Schedule shall, from and after the commencement of this Act, be chargeable with several duties specified in such Schedule. (Emphasis added.)

[39] In *Lim Teck Lee v The Commissioner of Stamps* [1956] 1 MLJ 135, the Singapore Court of Appeal held:

The fundamental principle is this. The Stamp Act taxes instruments, not transactions. If there are two ways of carrying out a transaction and the parties are content with the simpler, they are entitled to carry it out in that way.

[40] In *Galaxy Energy Technologies Sdn Bhd v Deputy Collector of Stamp Duty, Malaysia & Anor* [2011] 5 MLJ 145; [2011] 5 CLJ 829, this court held a similar view when it said:

The cardinal principle of stamp duty is that stamp duty is *chargeable on the instruments and not transactions*. As Finley J in *Prudential Assurance Co v Inland Revenue Commissioners* [1935] 1 KB 101 said:

The rule which must not be forgotten — namely, that under the Stamp Act one stamps, not transactions or anything of that sort, but one stamps instrument. (Emphasis added.)

[41] Reference may also be made to the case cited by the respondent, namely *Jones v Commissioners of Inland Revenue; Sweetmeat Automatic Delivery Company v Commissioners of Inland Revenue* [1895] 1 QB 484 where Wright J said:

> ... the word 'security' as used in these schedules does not mean as in popular language some obligation which is auxiliary to some obligation, but means any obligation created by any instrument.

[42] The decision was endorsed by the Court of Appeal in *National Telephone Company, Limited v Commissioners of Inland Revenue* [1899] 1 QB 250 where AL Smith LJ said:

> The question, however, is, not what in ordinary parlance could be called a security, but what is the meaning of the word 'security' in this taxing Act; and
>
> A bond given for the payment of a sum of money at stated periods, or a covenant given for such payment, is clearly a security within the meaning of the Act.

[43] *National Telephone Company, Limited* (above) was affirmed by the House of Lords in *The National Telephone Company, Limited v The Commissioners of Inland Revenue* [1900] AC 1.

[44] As to who bears the burden of proof in taxing laws, Harman J in *Holmleigh (Holdings) Ltd v IRC; Metropolitan Boot Co Ltd v IRC* (1958) 46 TC 435 held that it lies with the appellant. This is what he said:

> The burden of bringing the several transactions which affect them within the relevant dispensing sections is of course on the Appellants. This is not a case of a taxing Act where the Crown must justify its charges: the boot is on the other foot.

[45] In similar vein, Raus Sharif J (now CJ) in *Koperasi Serbaguna Kebangsaan Berhad v Pemungut Duti Setem, Wilayah Persekutuan, Kuala Lumpur* [2004] 7 MLJ 482; [2003] 8 CLJ 223 in dealing with the exemption of stamp duty sought by the co-operative society held as follows:

> To me, the above provision does not confer automatic exemption on all instruments executed by a co-operative society. It is the duty of the plaintiff when submitting the appropriate form to the defendant for the adjudication of the proper stamp duty under the Act, to seek for exemption by showing:
>
> (a) the instruments relating solely to the business of any society;
>
> (b) the society registered under any written law relating to co-operative societies; and
>
> (c) the instruments executed by the officer or member of such society.

[46] The decision was affirmed by this court in Civil Appeal No W-01–6 of 2004.

[47] Lord Russell in the House of Lords case of *Ben-Odeco Ltd v Powlson (Inspector of Taxes)* [1978] STC 460 had this to say on the subject:

> I start, my Lords, with the fact that this is a provision affording relief from tax. The taxpayer must persuade me that he is within it. If the reasons pro and con were in precise balance, the taxpayer on that basis would lose. But in upholding the view of the Special Commissioners and of Brightman J, as I do, I find the balance is in fact against the taxpayer company.

[48] The burden was therefore on the appellant to bring the facility agreement within the words of the Remission Order when it presented the agreement for stamping on 3 June 2015.

[49] In urging this court to dismiss the appeal, learned counsel for the respondent submitted that the Remission Order is only applicable to a loan agreement or loan instrument which:

(a) has no security whatsoever and is repayable on demand; or

(b) has no security whatsoever and is repayable in a single bullet repayment.

[50] It was submitted that the words used in the Remission Order are clear and as such must be applied, citing *Maughan (Surveyor of Taxes) v Free Church of Scotland* (1893) 3 TC 207 where it was stated:

> But if you claim exemption you must fall clearly within the words of the Statute, or it cannot be allowed by ingenious arguments such as were presented to us by Mr Jameson.

[51] The argument presupposes of course that the negative pledge given by the appellant is a security within the meaning of the Remission Order. We were told that such type of loan agreement or instrument is loosely termed as a 'clean loan'. What this means, conversely, is that a loan agreement or loan instrument with a negative pledge as security is not a clean loan and therefore not entitled to remission under the Remission Order, ie not exempted from payment of stamp duty.

[52] In this regard, the following observations by Martin B in *Limmer Asphalte Paving Company, Limited, v Commissioners of Inland Revenue* (1872) LR 7 Exch 211 may perhaps provide some assistance:

> In order to determine whether any, if any what, stamp duty is chargeable upon an instrument, the legal rule is that the real and true meaning of the instrument is to be ascertained; that the description of it given in the instrument itself by the parties is immaterial, even although, they may have believed that its effect and operation was to create a security mentioned in the Stamp Act, and they so declare. For instance, if a writing were headed by a recital that the parties had agreed to execute the promissory note thereafter written, yet if in truth the contract set forth was not a promissory note but an agreement of another character, the stamp duty would be not that of a promissory note but of the agreement. *The question, therefore, stamp or*

A *no stamp, and if a stamp to what amount, is to be determined upon the real and true character and meaning of the writing.* (Emphasis added.)

[53] In *Jones*, Wright J's views were as follows:

B I do not see how the Court could have arrived at the conclusion at which they did arrive unless that had been their view. It seems to me that we are bound by that decision; but even if we are not bound by it, it appears to me that it puts the proper construction on the schedule, and that the word 'security' as used in these schedules does not mean as in popular language some obligation which is auxiliary to some other obligation, but means any obligation created by an instrument.

C

[54] However, Collins J in the same case gave a somewhat different view when he said:

D Now, in 'mortgage, bond, debenture, covenant', it is clear that the statute is dealing with what we may call a primary security — with the instrument which creates the obligation as well as gives the right to recover the consideration; and therefore in that part of the Act it clearly does not appear to be used in any collateral or auxiliary sense.

E

[55] Lord Morris of Borth-y-Guest in *Inland Revenue Commissioners v Henry Ansbacher & Co* [1962] 3 All ER 843; [1963] AC 191:

F My Lords, it would be surprising if the word 'security' bore different connotations in different parts of the Act, and I cannot think that it does. If the word denotes an instrument which creates an obligation, then it will be seen that though a 'bond' or a 'covenant' may be a security, a 'security' will not necessarily be either. There may be a security (as for example the sale agreement in the present case) which is not a mortgage or bond or debenture covenant. I conclude therefore that, though the guarantee is caught by the words of the heading, it is not caught by the words which follow. To be chargeable the guarantee not only must be within the heading, but it

G must be a security which is a security for the payment or repayment of money *and it must also be the only or principal or primary such security. As it is not the only security, it is not liable to the amount of duty assessed by the commissioners*. (Emphasis added.)

[56] Then there is the pronouncement by Lord Clyde in *Cormack's Trustees v Inland Revenue* (1924) SC 819:

H

I In determining whether a particular instrument falls within this, or that — or within any — of the categories enumerated in the schedule and defined in the Act, it has been often said that *the substance and effect, rather than the precise terms, of the instrument should be regarded — Christie v Commissioners of Inland Revenue* LR 2 Exch 46; *Limmer Asphalte Paving Company, Limited, v Commissioners of Inland Revenue* (1872) LR 7 Exch 211; *Belch v The Commissioners* (1877) 4 R 592; *The Commissioners v Glasgow and South-Western Railway Co* (1886) 13 R 480 revd; (1887) 14 R (HL) 33; 12 App Cas 315. No doubt this is so; but the question is nevertheless one both of form and substance. Among the infinite variety of

transactions, there are some which are not necessarily and in themselves sales, but which may conveniently and effectually be carried out under the form of sale; and if the parties select that form as the vehicle of their transaction in preference to some other (which might be equally competent and effectual, but is considered less convenient, for the purpose of carrying out the objects in view), the substance of the transaction may be determined by the form selected. It is not that the legal form into which a transaction is thrown alters the substance. It is that the substance of a particular transaction may be equally consistent with the adoption of either legal form. It would be in vain to seek to avoid liability for the stamp-duty appropriate to the form selected merely because the substance of the transaction might have been carried into effect in another legal shape, the form of which would have attracted a stamp-duty of inferior denomination.

[57] Lord Ellenborough CJ in *Warrington and another v Furbor and another* [1803–13] All ER Rep 292; (1807) 8 East 242:

I think that when the subject is to be charged with a duty, the cases in which it is to attach ought to be fairly marked out, and we should give a liberal construction to words of exception, confining the operation of the duty.

[58] In *Alcan (NT) Alumina Pty Ltd v Commissioner of Territory Revenue* [2009] HCA 41; (2009) 239 CLR 27 the High Court of Australia made the following observations with regard to the Australian revenue law:

Fixing upon the general legislative purpose of raising revenue carried with it the danger that the text did not receive the attention it deserves. This danger was adverted to by Gleeson CJ in *Carr v Western Australia* when he said:

> [I]t may be said that the underlying purpose of an Income Tax Assessment Act is to raise revenue for government. No one would seriously suggest that s 15AA of the *Acts Interpretation Act* has the result that all federal income tax legislation is to be construed so as to advance that purpose. Interpretation of income tax legislation commonly raises questions as to how far the legislation goes in pursuit of the purpose of raising revenue. In some cases, there may be found in the text, or in relevant extrinsic materials, an indication of a more specific purpose which helps to answer the question. In other cases, there may be no available indication of a more specific purpose. Ultimately, it is the text, construed according to such principles of interpretation as provide rational assistance in the circumstances of the particular case, that is controlling.

... The general purpose of the Act to raise revenue is insufficient to support an intention to exclude a clearly expressed definition and to substitute a quite different meaning. Accordingly, the value attributable to an option to renew a lease should be excluded in making relevant calculations for stamp duty purposes under s 56N(2)(b) of the Act.

[59] As for the principles of statutory interpretation, we have within our shores the following pronouncement by Eusoffee Abdoolcader SCJ delivering

the judgment of the then Supreme Court in *Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35:

> The court however is not at liberty to treat words in a statute as mere tautology or surplusage unless they are wholly meaningless. On the presumption that Parliament does nothing in vain, the court must endeavor to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded. In *Quebec Railway, Light, Heart and Power Co Ltd v Vandry*, Lord Sumner in delivering the judgment of the Judicial Committee said (at p 676):
>
> > Secondly, there is no reason why the usual rule should not apply to this as to other statutes — namely, that effect must be given, if possible, to all the words used for the legislature is deemed not to waste its words or to say anything in vain.
>
> ... We should perhaps reiterate that the starting point in statutory interpretation is to consider the ordinary meaning of the word or phrase in question, that is its proper and most known signification. Some three months ago Lord Scarman in delivering the leading judgment of the House of Lords in *South West Water Authority v Rumble's* [1985] 2 WLR 405 said (at p 411):
>
> > ... the language of the two paragraphs consists of ordinary English words which possess by their very impression the flexibility which is the hallmark of the English language, and which is one of the reasons for the survival of English as a living and worldwide tongue. I have no doubt that it would be contrary to the legislative purpose of the enactment to restrict or refine their breadth and flexibility in the context of this legislation, which has to cover a wide range of circumstances and situations present and future. A restrictive interpretation of the Legislature's language would defeat the broad purpose of this innovative and reforming statute.

[60] Coming back to the word 'security', Lexis Nexis publication of *Words, Phrases and Maxims — Legally and Judicially Defined* (Vol 13) defines it to mean as follows:

> A security is an encumbrance, vested in a creditor, *over the property of his debtor*, for the purpose of securing the repayment of a debt. It is *a right in the property of another*, which enables a person, who is entitled to receive a definite value from that another in default of so receiving it, *to realise it from that property*. The purpose of a security is to ensure, of [sic] facilitate, the fulfilment, or enjoyment, of some other right vested in its owner. Securities may be classified into:
>
> (i) mortgages;
>
> (ii) pawns;
>
> (iii) floating charges;
>
> (iv) lien.
>
> This word has a variety of meaning:

(i) the general name for all mortgages, charges, debentures, etc, whereby repayment of money is assured or secured; A

(ii) any document by which any claim may be enforced. (Emphasis added.)

[61] Going by this definition, the negative pledge by the appellant is certainly not a security as it is not an encumbrance vested in Maybank over the properties of the appellant, nor does it vest in Maybank a right over the properties which enables Maybank to realise the loan amount from the properties in the event of default by the appellant. Being a mere pledge not to encumber properties and nothing more, there is no property for the respondent to realise in the event of default. B C

[62] The true legal effect of the negative pledge given by the appellant is that it merely created an obligation not to encumber. It does not provide an obligation to repay any sum or sums of money in any way whatsoever. This is to be contrasted with that of a charge, mortgage or guarantee. In these instruments, upon the occurrence of an event of default, the sums of money become due and payable and failure to pay will expose the assets encumbered to foreclosure proceedings to redeem the loan sums. D E

[63] We agree with learned counsel for the appellant that in the event of default by the appellant, Maybank will be considered as an unsecured creditor and will be equal in right of payment ie pari passu vis a vis the other creditors. It is therefore incorrect for the learned judge to hold the view that the negative pledge by the appellant assured or guaranteed Maybank of payment in the event of default. F

[64] It is an undisputed fact that the appellant did not pledge any tangible asset or property as security that can be disposed of, sold or converted to cash to pay for the facility. The learned judge however did not consider this as negativing the element of 'security' in the facility agreement when she held: G

> However, it must be noted that according to cl 1.1 of the facility agreement, the negative pledge by the plaintiff to the bank is an 'undertaking' that the plaintiff 'will not create or permit to arise or subsist any encumbrance, mortgage, charge, pledge, lien, right of retention, right of set off or any other security interest on the whole or any part of the plaintiff's present or future assets' other than those provided therein. Therefore, it can be construed that whilst the plaintiff did not pledge any tangible asset as a security, the plaintiff has given an undertaking not to create any security interest in the plaintiff's assets. This means that, if construed within the meaning of the word 'security' as stated in the *Concise Oxford Dictionary*, the plaintiff has given to the bank a 'security' in the form of 'a guarantee of the fulfilment of an undertaking or the payment of a loan'. By the 'obligation created by an instrument', namely the facility agreement (following the meaning of the word 'security' as explained by Wright J in *Jones*), the bank is assured by the plaintiff's negative pledge H I

A that when the bank demands the sum loaned under the facility agreement, the plaintiff is able to pay back the loan or facility since the plaintiff is not encumbered by other claims on the plaintiff. In that way, the bank is guaranteed that recall of the loan on demand can be secured.

B In view of the express provisions in the facility agreement that the 'Security Documents' ie the facility agreement and the negative pledge constitute 'security for the payment obligations and liabilities of the customer' ie the plaintiff, I agree with the submissions of the defendant that the plaintiff's facility agreement is a loan agreement or loan instrument *with security*. It is not one 'without security' as envisaged in para 2 of the Remission Order 2012 to entitle the plaintiff to C remittance of stamp duty as provided therein.

[65] The *Concise Oxford Dictionary* (9th Ed) which the learned judge referred to in the first paragraph of the above passages gives five different meanings to the word 'security', as follows:

D

1 a secure condition or feeling. *2 a thing* that guards or guarantees. *3a* the safety of a state, company etc, against espionage, theft, or other danger. *b* an organization for ensuring this. *4 a thing* deposited or pledged as a guarantee of the fulfilment of an undertaking or the payment of a loan, *to be forfeited in case of default*. *5* (often in *pl*) E a certificate attesting credit or ownership of stock, bonds, etc. (Emphasis added.)

[66] Of the five meanings, only meanings two and four are relevant, but even then they speak of 'a thing' that guards or guarantees, or deposited or pledged as a guarantee of the fulfilment of an undertaking or the payment of a loan, to F be forfeited in case of default.

[67] With due respect to the learned judge, her reliance on the above dictionary meaning is misconceived. Surely a negative pledge in terms of cl 1.1 of the facility agreement cannot by any stretch of the imagination refer to 'a G thing that guards or guarantees', nor is it 'a thing deposited or pledged as a guarantee of the fulfilment of an undertaking or the payment of a loan, to be forfeited in case of default'. There was nothing deposited and there is nothing to forfeit. This fact alone dispels any notion that the negative pledge is a H security within the meaning of the Remission Order.

[68] A 'thing' must necessarily refer to some tangible asset and not merely a pledge not to do a certain act. To give the construction that the learned judge had given will be to stretch the meaning of the word 'security' beyond what is I contemplated by Parliament in the Remission Order.

[69] Since the negative pledge relates to an 'encumbrance', it is perhaps necessary to find out what the word means. The *Oxford Dictionary of Law* (7th Ed) defines it to mean:

A right or interest in land owned by someone other than the owner of the land itself; examples include easements, leases, mortgages, and restrictive covenants.

[70] So, going by this definition, in order to create or to permit to arise or subsist any 'encumbrance', it must relate to land, over which Maybank is vested with a right or interest. Obviously, the definition does not cover the negative pledge given by the appellant as the pledge is not limited to land but to 'the whole or any part of our present or future assets'.

[71] We agree with the point taken by learned counsel for the appellant that there is no other instrument independent of the facility agreement which secures an obligation to secure a sum or sums of money on demand. As the negative pledge only creates an obligation not to encumber or charge assets as stipulated in the pledge, the facility agreement clearly falls under sub sub-item 22(1)(b) of the First Schedule to the Stamp Act.

[72] The matter of concern for the Remission Order is not the loan agreement or loan instrument itself but whether there is in existence another instrument that creates an obligation to pay a sum or sums of money on demand or in a single bullet payment. It is only where such instrument exists that entitlement to a remission of stamp duty is excluded by the Remission Order.

[73] It bears repeating that a negative pledge by its very nature does not represent any guarantee that the sum or sums of money can be demanded from the appellant. It is merely a pledge to abstain from creating any form of charge, encumbrance or security. It is clearly not a 'security for any sum or sums of money repayable on demand', unlike a guarantee or a charge.

[74] We further agree with learned counsel for the appellant that the negative pledge will not help Maybank in any way towards recovery of the debt. The negative pledge does not create such obligation because it is merely a contractual obligation not to charge or encumber any asset and not an obligation to repay any sum or sums of money on demand.

[75] In the event of default, nothing arises from the terms of the negative pledge and it does not make the sum or sums of money repayable on demand. This is of course another way of saying that there is no 'security' in the form of 'a guarantee of the fulfilment of an undertaking or the payment of the loan'.

[76] The learned judge was therefore erroneous in holding that the negative pledge given by the appellant constitutes security for the facility agreement. To reiterate, there does not exist in the facility agreement any security for any sum or sums of money repayable on demand or in single bullet repayment. The

facility agreement is therefore a loan agreement without security and is entitled to remission under the Remission Order.

[77] It was for all the reasons aforesaid that we allowed the appeal with costs of RM10,000, subject to payment of the allocator fee.

Appeal allowed with costs of RM10,000 subject to payment of allocator fee.

Reported by Dzulqarnain Ab Fatar